

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

DALLAS COWBOYS FOOTBALL CLUB, LTD	§	Civil Action No. 06-cv-01906
and	§	<b><u>ECF CASE</u></b>
NFL PROPERTIES, LLC,	§	
	§	
Plaintiffs/Counterclaim Defendants,	§	
	§	
AMERICA'S TEAM PROPERTIES, INC.,	§	
	§	
Defendant/Counterclaimant.	§	

**DECLARATION OF ROBERT L. RASKOPF**

I, ROBERT L. RASKOPF, being duly sworn, declare as follow:

1. I am a member of the law firm Quinn Emanuel Urquhart Oliver & Hedges, LLP, attorneys for Plaintiffs/Counterclaim Defendants Dallas Cowboys Football Club, Ltd. and NFL Properties, LLC.
2. I am submitting this declaration to provide the Court with certain documents and information that support Plaintiffs/Counterclaim Defendants' Motion to Exclude from Evidence the Reports, Affidavit, and Testimony of Defendant/Counterclaim Plaintiff's "Expert" Witness James T. Berger.
3. Attached hereto as Exhibit 1 is a true and correct copy of the Report of James T. Berger, dated March 25, 2008.
4. Attached hereto as Exhibit 2 is a true and correct copy of the Supplemental Report of James T. Berger, dated April 11, 2008.
5. Attached hereto as Exhibit 3 is a true and correct copy of the Research Report of James T. Berger, dated April 11, 2008.

6. Attached hereto as Exhibit 4 is a true and correct copy of relevant excerpts from the Deposition of James T. Berger, dated April 30, 2008.

7. Attached hereto as Exhibit 5 is a true and correct copy of the Expert Report of Gabriel M. Gelb, dated February 14, 2008.

8. Attached hereto as Exhibit 6 is a true and correct copy of relevant excerpts from the Deposition of Gabriel M. Gelb, dated April 8, 2008.

9. Attached hereto as Exhibit 7 is a true and correct copy of James T. Berger, "How To Do An IP Survey Without Giving Away The Store," Intellectual Property Today, April, 2008.

10. Attached hereto as Exhibit 8 is a true and correct copy of James T. Berger, "The Power and Perils of Internet Surveys," Intellectual Property Today, August, 2007.

11. Attached hereto as Exhibit 9 is a true and correct copy of "Why Online? New Benefits and Possibilities," A Market Tools White Paper, April 26, 2005.

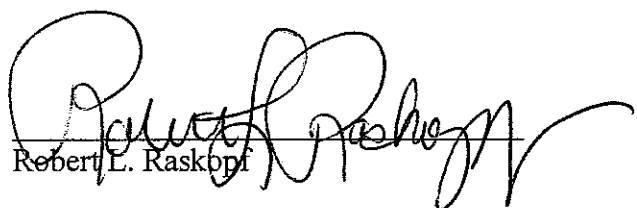
12. Attached hereto as Exhibit 10 is a true and correct copy of James T. Berger, "Swimming in Shark-Infested Waters," Intellectual Property Today, June, 2004.

13. Attached hereto as Exhibit 11 is a true and correct copy of James T. Berger, "10 Easy Ways To Blow Away A Survey," Intellectual Property Today, January, 2007.

14. Attached hereto as Exhibit 12 is a true and correct copy of James T. Berger, "Creativity -Key to Executing Toughest IP Surveys," Intellectual Property Today, July, 2005.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 10th day of May, 2008.

  
Robert L. Raskopf

## Report of James T. Berger

Re: Dallas Cowboys Football Club, Ltd. and NFL Properties, LLC v.  
America's Team Properties, Inc.



BERGER0001

Report of James T. Berger

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3/25/2008



## Report of James T. Berger

Re: Dallas Cowboys Football Club, Ltd. and NFL Properties, LLC v.  
America's Team Properties, Inc.

### I. INTRODUCTION

1. This declaration focuses on my critique of the "Expert Report of Gabriel M. Gelb." In the course of this declaration, I will offer my opinion as a survey expert on what I believe to be key issues with respect to Mr. Gelb's research effort and report as it relates to the matter in question.

### II. PERSONAL BACKGROUND

2. Present Activities. I have been a faculty member at Northwestern University from 1986 through 2005 and a faculty member at Roosevelt University since 2001. I am also Principal of James T. Berger/Market Strategies, a strategic marketing communications and consulting firm. At Northwestern University, I taught courses in Principles of Marketing, Integrated Marketing Communications, Strategic Marketing, and Introduction to Public Relations. At Roosevelt University's Walter E. Heller College of Business Administration, I currently teach courses in Retail Merchandising and Control, Advertising, Consumer Behavior, Personal Selling and Sales Management, Global Marketing, Marketing Management, and Marketing in Theory and Practice. I have previously taught marketing related courses at Northwestern University's Kellogg

Graduate School of Management, DePaul University's College of Commerce, The Lake Forest Graduate School of Management, and the University of Illinois at Chicago. I have authored many articles dealing with marketing and other business related issues. A copy of my curriculum vitae, summary of my teaching experience, publications list, billing rate and testimony experience, are attached to this report as **Exhibit A**.

3. Education. I received my Master's Degree in Business Administration in 1978 from the University of Chicago Graduate School of Business, with concentrations in marketing and finance. I also received a Master of Science Degree in Journalism from Northwestern University's Medill School of Journalism in 1965, with concentrations in the news and editorial sequence, and a Bachelor of Arts Degree with a major in journalism from the University of Michigan in 1964.
4. Prior Experience. I have previously worked as an Account Supervisor for two Downtown Chicago advertising agencies, as Vice President and Director of Public Relations for another Downtown Chicago advertising agency and as Account Supervisor for two major Downtown Chicago public relations agencies. I have had my own marketing communications consulting practice for more than 20 years and have been involved in marketing consulting and survey work for law firms for nearly 10 years.
5. Market Research/Trademark Experience. I also have extensive market research experience, including quantitative and qualitative survey

research, and have done both in-person and telephone interviewing in various industries with respect to brands and trademarks. I have also designed and coordinated market research programs, including drafting questionnaires, performing and supervising personal interviews, organizing focus groups, tabulating and evaluating data, and preparing research reports. I was a presenter at a session in March, 2003, before the Minnesota State Bar Association entitled "The Effective Use of Survey Experts and Evidence in Trademark Cases." My presentation, entitled "Intellectual Property Surveys...Best Practices" has been accredited for continuing education credits by both the Chicago and Milwaukee Bar Associations, where I have presented the program. In addition, I have authored six articles on intellectual property trademark/secondary meaning surveys for *INTELLECTUAL PROPERTY TODAY* Magazine: (1) "10 Frequently Asked Questions About Intellectual Property Surveys," which appeared in the August, 2003, issue and (2) "Swimming in Shark-Infested Waters," which appeared in the June, 2004, issue, and (3) "Creativity Key to Executing Toughest IP Survey Projects," which appeared in July, 2005; (4) "What IP Attorneys Should Know About Expectations and Costs for Survey Research," which appeared in the April, 2006, issue, (5) "10 Easy Ways to Blow Away A Survey," which appeared in the January, 2007, issue, and (6) "The Power and Perils of Internet Surveys," which appeared in the August 2007 issue. I also do extensive freelance writing for magazines and other publications on a

variety of business-related topics including marketing, marketing communications and trademarks. In addition, earlier in my career, I worked as Account Executive and later Account Supervisor at The Public Relations Board, Inc. Chicago. In this capacity, I did a number of surveys and was responsible for compiling the MUSIC U.S.A. annual statistical survey of the music industry and music participation in the United States.

6. Trademark Testifying Experience. I have testified as an expert in strategic marketing, marketing communications and intellectual property surveys with respect to brands and trademarks. I have directed more than 40 surveys dealing with likelihood of confusion, secondary meaning and generic issues. Two of the surveys I directed involved the use of the Internet. One of my articles for *Intellectual Property Today*, "The Power and Peril of Internet Surveys" appeared in the August, 2007, issue. Over the last 10 years I have been retained as an expert in three dozen or more lawsuits. In many of those lawsuits the issue was some form of trademark or trade dress infringement. In addition, I have been retained as an expert in cases involving efforts to prove or disprove secondary meaning. I have also been involved with cases where the issue was generic-ness. In most of those lawsuits I have given deposition testimony.

### III. RETENTION

7. I was retained in this matter by Winthrop & Weinstine, P.A., counsel for the defendant. I was asked to review and critique the "Expert Report of Gabriel M. Gelb." I also reviewed "Internet Surveys for Trademark

Litigation," by Gabriel M. Gelb and Betsy D. Gelb, which was published in the September-October, 2007, issue of *The Trademark Reporter*. In addition, I reviewed various court documents provided to me by counsel. I am being paid \$400 per hour for my time.

#### IV. GENERAL ANALYSIS

8. In analyzing this matter, I find a number of serious concerns that, in my opinion, have a significant impact on both the findings of the research and the opinions of Mr. Gelb based on the research. The keys areas in gauging the strengths or weaknesses of a survey are: (1) **Validity** and (2) **Reliability**. Validity relates to the strength of the survey in its ability to enable the respondents to understand what is being asked. Reliability is the ability of the survey to produce similar results when replicated in similar research settings. In my opinion, Mr. Gelb's survey is neither valid nor reliable. These specific concerns focus on:

- The survey methodology including the use of gender quotes, inconsistency in age eligibility and possible geographic bias.
- The lack of any test for likelihood of confusion and inadequate results to prove "secondary meaning."
- The use of a consumer panel made up of people highly motivated to take frequent surveys as opposed to the general population, which is far more averse to taking surveys.
- The questioning of people in the Dallas-Fort Worth, TX, area and who are clearly geographically biased. If the goal was to determine



secondary meaning in the state of Texas, a sample including the entire state would be required.

- The use of a control illustration that fails to relate to the issue at hand. A more appropriate control would be one that was both sufficiently different yet sufficient alike the test stimulus.
- The general problems inherent to the use of Internet surveys for cases such as the one in question.
- There was no attempt in the screening process to eliminate people who have family members who work for advertising agencies or market research agencies or have family members who are employed by retailers who sell sports-related apparel. Such subjects are normally excluded in telephone and mall intercept surveys because they often bias the results.

#### IV. SPECIFIC AREAS OF CRITICISM.

9. Methodology Deficiencies. In reviewing subsequent documentation provided by Mr. Gelb in the form of produced e-mails, the following information was revealed that was not contained in the report:

- A. There was an attempt to have gender quotas. In an exchange of e-mails from Mr. Gelb to Greenfield Project Manager Daniel Shen it appears there is an effort to produce a 70-30 male-female gender split. Whether it helps or hurts the results of the survey such an attempt at a gender split should have been included in the

report because it is part of the methodology and should have been reported.

- B. Greenfield selected participants in only five statistical areas: Miami, Boston, Chicago, Dallas and Seattle, according to an e-mail dated Jan. 11, 2008, from Greenfield's Patrick Kimball to Gelb. This geographic split was not included in Gelb's report and if, in fact, one-fifth of the respondents selected were in the Dallas CMSA, that would greatly bias the results. The report misleadingly implies that Greenfield used a national sample.
- C. In work document (NFLP-COWBOYS 11377) quota parameters were spelled out: United States (Except Dallas) N1200 (Nested Quota – 840 males/360 females) [a 70%-30% split.]. It was also pointed out the survey should be terminated if a person is 15 years old or less. To be a member of the Greenfield panel, one must be 18 years old or over. Apparently 16- and 17-year-olds were eligible as well. This is yet another example of the Gelb Report's failure to accurately reveal methodology.

**These three major flaws in methodology reporting potentially bias the survey and impact on both reliability and validity.**

10. **A secondary meaning study only and not a likelihood of confusion study.** A fundamental shortcoming in the Gelb survey is its failure to prove or disprove likelihood of confusion. The study is

strictly an attempt to determine if "America's Team" is so closely associated with the Dallas Cowboys football team to have achieved secondary meaning. What Mr. Gelb simply did was to show the respondent an image of a cap emblazoned with "America's Team" and to ask a series of questions to determine who the respondent believe produced the cap or what organization came to mind when shown the cap. This is a test for "secondary meaning," but the result of 19 percent in the national sample is woefully inadequate to prove secondary meaning.

The main conclusion in the Gelb report was that 19 percent of the respondents cited "America's Team" as being uniquely associated with the Dallas Cowboys. From that, Mr. Gelb concludes that a state of "secondary meaning" exists for America's Team with respect to the Dallas Cowboys professional football team. The key question becomes: is 19 percent a significant enough percentage in a survey to establish secondary meaning? In *Spraying Systems Company v. Delevan, Inc.* (No. 89 C 8447), which was decided in the U.S. District Court for the Northern District of Illinois, Eastern Division, by U.S. District Judge Milton I. Shadur, on March 22, 1991, the question of secondary meaning was at issue. In that case the plaintiff produced a survey that produced a 38 percent response rate. Judge Shadur pointed out:

"Though a 38% response rate may be probative for purposes of proving likelihood of confusion, in order to prove secondary meaning a "substantial" portion of buyers must associate the product with one source

and generally over 50% is regarded as clearly sufficient, while a 38% figure would have been marginal even in a *properly* designed survey."

The U.S. Court of Appeals, Seventh Circuit (No. 91-1919) in its decision dated Sept. 17, 1992, affirmed the lower court's decision with respect to 50% secondary meaning threshold:

"Finally, the district court noted that the 38-percent response figure (representing those associating the six names with a single company) would be marginal to prove secondary meaning even in a properly designed survey....The district court's point remains valid. While a 50-percent figure is regarded as clearly sufficient to establish secondary meaning, a figure in the thirties can only be considered marginal...."

McCarthy on Trademarks (West Group Rel. #18, 6/2001)

discusses the percentages needed to prove secondary meaning in 15:45:

"The Court of Customs and Patent Appeals has stated that adequate proof of secondary meaning means more than proof of a 'relatively small number of people' who associate the symbol with one source. The court said that where a survey had shown that only about 10 percent of actual users associated the name with a single source, that was insufficient. One federal court stated: 'Proof of secondary meaning requires more than proof of the existence of one person or even a relatively small number of people who associate the term with a single source. Another court indicated that survey evidence showing that 25 percent of the interviewees connected plaintiff's mark with a single source was insufficient proof of secondary meaning. Thus, while it is clear that there is no necessity that a *majority* of concerned customers associate the mark with a single source, how much less than a majority which will suffice is not clearly defined in the cases.'"

What is clear from Mr. Gelb's work was that more than 80 percent of those questioned DID NOT associate America's Team with the Dallas Cowboys. As for the issue of "likelihood of confusion," Mr. Gelb's survey did not properly test this. While there may be a number of different ways to test likelihood of confusion, it must be shown that an alleged infringer has produced a product or

service that is likely to be confused with the trademarked product or service. In the case of America's Team, an appropriate method to attempt to prove or disprove likelihood of confusion, would be to try to simulate a shopping experience where the trademarked good is placed within an array of products that include the alleged infringing product as well as other similar products within the specific category. The survey respondent would be asked a question such as "which if any of these products, if any, do you believe were put out by the same company." If a sufficient number selected the both the alleged infringing product along with the trademarked product as being put out by the same company, one might assume there was likelihood of confusion.

This failure to prove likelihood of confusion and the inadequate secondary meaning findings attack both the validity and reliability of the survey's findings.

11. **The use of the Greenfield Online panel.** Because response rates for Internet surveys are so low, researchers have increasingly turned to the on-line panels to achieve higher response rates. Members of such panels are compensated or motivated to take surveys offered by the consumer panel. The more surveys they qualify for and can take the greater will be their reward. Thus, when researchers use such panels they are basically using

"professional survey takers." The essence of a probability survey is that every member of the target market has an equal chance of being selected. Members of panels are different from the general population. They are biased in that they seek to take surveys. There is another factor at work here. Frequent survey takers have an inherent desire to please the survey giver and often seek to provide answers they believe the survey giver seeks. On the other hand members of the general population are far more averse to taking surveys. The pre-selection of respondents by using the Internet panel has the potential to affect the reliability of the survey's results. *In both mail and telephone surveys that I do for my clients, one often excludes anyone who has participated in a consumer survey within the last 90 days in an effort to eliminate the "professional survey taker."*

Mr. Gelb's use of the Internet panel undermines the validity and reliability of the findings.

**12. The questioning of people in the Dallas-Fort Worth Area.**

Clearly these individuals are not only biased but should been excluded from taking any kind of a national survey on the subject at hand. Remarkably, even in such a biased locale, only 40 percent of the population recognized the Dallas Cowboys as America's Team, and that is well below the 50 percent secondary meaning threshold. Moreover, Dallas-Fort Worth is hardly an

adequate test for the state of Texas. If the purpose of the Dallas-Fort Worth study to prove a legal issue related to the Texas statutes, an adequate survey would include all parts and population areas of Texas developed in a random basis. A key fact that is omitted from Mr. Gelb's report is how many Dallas/Fort Worth people were included in the "national" survey. Once again this calls into question both validity and reliability issues of the Gelb survey.

13. **Inadequate control.** "The Best" as a control for "America's Team" doesn't seem to be related to one another. In the "Reference Guide on Survey Research," author Shari Seidman Diamond discusses the use of "controls" in her Section F. entitled *"If the Survey Was designed to Test a Causal Proposition, Did the Survey Include an Appropriate Control Group of Question?"* Diamond explains why controls are used:

"If 40% of viewers of the test commercial report that it conveys a deceptive message (e.g. the product has fewer calories than its competitor), that response rate is evaluated against the base background noise level obtained from a control group. If 40% of the viewers who watched the commercial without the allegedly deceptive message report getting the idea that the product has fewer calories than its competitor, then 40% cannot logically be attributed to the content of the commercial being examined for deception. If the confusion level in the control group is significantly lower than 40%, then the increased confusion of the respondents in the experimental group can be attributed only to the commercial they viewed"

In the Gelb survey, the cap with "The Best" was designated as the control stimulus. The fact that only one interviewee attributed "The Best" to the Dallas Cowboys indicates an extremely low "noise level." Thus the Gelb findings were not reduced due to "noise."

As to what constitutes an adequate and unbiased "control" question or stimulus. Diamond writes:

"In the simplest version of a survey experiment, respondents are assigned randomly to one of two conditions. Respondents assigned to the experimental condition view the alleged deceptive commercials, and respondents assigned to the control conditions either do not view a commercial that does not contain the allegedly deceptive material."

In the survey in question, "America's Team" can be equated to the "alleged deceptive commercial" in Diamond's model and "The Best" would be the control. The critical question is how adequately does "The Best" eliminate "noise" from "America's Team?" Is there sufficient connection to uncover and determine "noise" levels? In my opinion, "America's Team" and "The Best" are so far removed from each other that the control has no value.

Moreover, because the "noise" responses are always deducted from the test results, in my opinion the control selected by Mr. Gelb is, effectively, no control at all. By way of example, a more acceptable control would be "NATION'S TEAM."

The control problem attacks the validity of the survey's findings.

14. **Rationale for Using Internet Survey.** In Mr. Gelb's article entitled "Internet Surveys for Trademark Litigation," he makes a comparison between telephone, mail intercept and Internet surveys. He explains that the weakness of the telephone survey is the difficulty in reaching people "due in part to the explosive utilization of cell phones, since they are excluded from the



databases of firms that sell telephone lists of available numbers to research organizations for random digit dialing." He also mentions increasing use of voicemail, caller ID and other blocking mechanisms. *I disagree with Mr. Gelb's opinion. In fact, my experience with telephone surveys demonstrates that one can achieve far higher participation rates from telephone surveys when compared with the Internet surveys I attempted using consumer panels.*

Another alternative discussed by Mr. Gelb is the mall intercept survey. This form of survey, which Mr. Gelb chose not to conduct, would have worked nicely in this situation. Respondents can be screened in the same way they were screened in Mr. Gelb's Internet survey so a relevant population could be uncovered. Rather than an electronic image of the sports cap, which was shown in the Internet survey, in the mall intercept study the respondent could be shown the true item of apparel. *In my opinion, the mall intercept survey would have been the best option for the issue at hand. Doing 50-75 surveys in four or five venues would produce sufficient numbers and the professional survey taker could be screened out.* In fact, by limiting panels to five metropolitan areas, Mr. Gelb essentially did an electronic version of a mall intercept study. While he might argue that producing 1,200 completed surveys provides a high

degree of accuracy, in fact the error factor (assuming a 95 percent level of confidence) for a survey of 1,200 is 3 percent while the error factor for a survey of 400 is 5 percent. While Mr. Gelb took advantage of economies of scale in the Internet panel methodology, the relatively large numbers of participants add little to both validity and reliability of the survey. Moreover, the disadvantages inherent in the Internet methodology largely outweigh the small advantage of the larger participant pool.

15. **Screening bias.** There was no attempt to eliminate respondents who work for or who have families who work for advertising agencies or market research firms. More importantly, there was no attempt to screen out people who work for retailers who sell sports-related apparel. All my telephone and mail intercept surveys have protocols that screen out people who have potential biases such as these. I also screen out people who have participated in a survey within the last 90 days, to screen out the frequent survey taker bias.

The failure to screen out participants with characteristics different from the general population introduces potential bias because these segments have atypical knowledge of the survey research process and the retail environment for sports-related products.

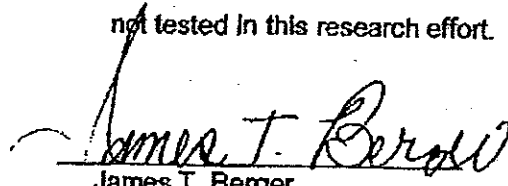
#### **V. FINAL SUMMARY**

16. In summary, it is my opinion that the research effort directed by

Mr. Gelb has major validity and reliability weaknesses:

- A. Methodology with unreported gender quotas, geographic selection and age discrepancies.
- B. The research does not provide a test for likelihood of confusion, and the findings are inadequate to prove secondary meaning.
- C. The use of a consumer panel such as Greenfield Online has an inherent bias because it rewards the "professional survey taker" and the market segment is inherently different from the general population.
- D. The questioning of people in the Dallas-Fort Worth area provides nothing but a regional bias. Despite this bias, only 40 percent of those questioned recognized the Dallas Cowboys as "America's Team," and even this failed to achieve the 50 percent threshold for secondary meaning.
- E. The use of "The Best" as a control effectively equated to no control.
- F. Mr. Gelb's Internet survey, in my opinion, was not an effective way to test his hypothesis. A mall intercept survey would have been a far better alternative.
- G. There is a high potential for bias by the inability of the survey to screen out people who work for or have people in their households who who work for advertising agencies, market research firms or retailers who sell sports-related apparel.

In conclusion, it is my opinion that the significant weaknesses of this survey — from both validity and reliability perspectives — lead me to believe the survey and its results did not effectively prove or disprove the existence of secondary meaning with respect to the Dallas Cowboys and "America's Team." Furthermore, the issue of likelihood of confusion was not tested in this research effort.

  
James T. Berger

MARCH 25, 2008

## EXHIBIT A

### CURRICULUM VITAE

**James T. Berger**

*IP Litigation Services & Surveys; Trademarks/Brands/Marketing;  
Marketing Consultant; Free-Lance Writer; University Instructor*

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### EDUCATION

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- MBA University of Chicago, Graduate School of Business, concentrations in marketing and finance.
- MS Northwestern University, Medill School of Journalism, concentration in news/editorial sequence.
- BA University of Michigan, College of Literature, Science and the Arts, major in journalism.

### PROFESSIONAL EXPERIENCE

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MARKET STRATEGIES, Chicago, Northbrook and Evanston, IL (1983 to present) Principal of this marketing services/consulting firm, which specializes in:

- Strategic marketing planning including creating written market plan documents.
- Implementing marketing programs.
- Integrated marketing communications services including advertising, public relations, sales promotion, direct mail.
- Project management including building and directing creative and production teams to execute marketing plans and specific tasks.
- Helping clients develop and maintain business relationships.

As a "hands-on" consultant, I help clients develop strategies and programs as well as assist in the implementation. The firm concentrates on business-to-business marketing with specific focus on financial services, accounting and consulting services, commercial real estate, eldercare, office technology, manufacturing and distribution. Concurrent with the management of Market Strategies, I became involved with:

THE INVESTOR RELATIONS COMPANY, Northbrook, IL (June 1998 to July 1999) As Senior Vice President, I was involved in the full array of Investor Relations activities including account management; working with the financial press including magazines, newsletter and wire services; direct contacts with analysts and brokers; and writing of financial news releases, quarterly and annual reports, profiles and fact sheets.

THE FINANCIAL RELATIONS BOARD, INC., Chicago, IL (April 1997 to June 1998) As an Account Manager for this large, national investor relations firm, I:

- Coordinated account service, market intelligence and media activities.
- Created investment profiles and fact sheets; developed and wrote annual reports, quarterly earnings releases and other news releases.

STERN WALTERS/EARLE LUDGIN, Inc., Chicago, IL (1980-83) Vice President – Account Supervisor:

- Account manager for Associates Commercial Corporation account, a commercial finance company with advertising billings in excess of \$7 million.
- Account manager for Sears, Roebuck & Co. Contract Sales Group division.
- Developed marketing strategies, planning and account management.

THE WITTELEDER COMPANY, Inc., Chicago, IL (1976-80) Vice President – Account Supervisor:

- Created and implemented marketing strategies and programs.
- Clients involved in office products and services, data systems, micrographics, commercial real estate, automotive aftermarket and financial services.

BRAND ADVERTISING, Inc., Chicago, IL (1973-76) Vice President – Director of Public Relations:

- Responsible for firm's public relations profit center.
- Programming, planning, client and media contact, writing and editing.
- Active in new business development.
- Clients involved in automotive aftermarket, industrial equipment, agriculture.

GOLIN/HARRIS COMMUNICATIONS, Inc., Chicago, IL (1971-73) Account Supervisor for this large public relations agency:

- Worked on McDonald's restaurants, agency's major account.
- Created national model awareness program for Chicagoland market.
- Managed McDonald's involvement in public affairs, ecology, energy conservation, labor relations and the inner city.
- Involved in financial relations and marketing-support activities.

### **EARLY EXPERIENCE**

Began career as copy, wire and make-up editor for CHICAGO DAILY NEWS. Moved into corporate public relations as editor of an employee publication for ILLINOIS BELL TELEPHONE COMPANY in Chicago and Springfield, IL. As a publicity specialist for MORTON INTERNATIONAL INC., I became involved in the consumer, industrial, institutional, automotive and agricultural markets. My first experience in agency public relations was with THE PUBLIC RELATIONS BOARD, INC., (now known as PORTER NOVELLI), first as an account executive and later as an account supervisor.

### **PROFESSIONAL MEDIA EXPERIENCE**

- Copy Editor for *Chicago Daily News*, Chicago, IL
- Editor and General Assignment Reporter for *The Patriot Ledger*, Quincy, MA
- Correspondent for *United Press International* in Ann Arbor, MI
- Part-time general assignment reporter for *Pioneer Press* newspapers, Wilmette and Highland Park, IL
- Free-lance columnist for *Homelife* section of *Chicago Sun Times*

### **ARTICLES PUBLISHED**

Intellectual property litigation-related articles:

- "10 Frequently Asked Questions about Intellectual Property Litigation Surveys" published in the August 2003 issue of *Intellectual Property Today*.
- "Swimming in Shark-Infested Waters," published in June 2004 issue of *Intellectual Property Today*.
- "Creativity Key to Executing Toughest IP Survey Projects," published in July 2005

- issue of *Intellectual Property Today*.
- “What IP Attorneys Should Know About Expectations and Costs For Survey Research,” published in April 2006 issue of *Intellectual Property Today*.
- “10 Easy Ways to Blow Away a Survey,” published in the January 2007 issue of *Intellectual Property Today*.

**Marketing communications-related articles published in:**

- *Crain's Chicago Business*, a weekly business publication.
- *Services Marketing Today*, published by the American Marketing Association.
- *Talking To The Boss*, a weekly business publication.
- University of Chicago Graduate School of Business alumni magazine.
- *Your Business*, a quarterly magazine published for GE Capital by Baumer Financial Publishing, Chicago.
- *Independent Business*, a monthly magazine published by Group IV Communications, Thousand Oaks, CA.

**Business-related articles in published in:**

- *Active Times*
- *Business Life*
- *Office Dealer*
- *Office System*
- *Chicago Sun-Times*
- *Dow Jones Business Employment Weekly*
- *Texas Realtor*
- *Multifamily Executive*
- *Office and Industrial Properties*
- *Real Estate Profiles*
- *Kiwanis Magazine*
- *The Rotarian*
- *Executive Decision*
- *Home Business Journal*
- *Business Sense*
- *Real Estate Chicago*
- *American Fitness*
- *Area Development*
- *Real Estate Chicago*
- *Grid*
- *Plants, Sites & Parks*
- *Journal of Property Management*
- *Commercial Investment Real Estate*
- *Crain's Chicago Business*
- *Tax Credit Advisor*

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## **TEACHING EXPERIENCE**

### **NORTHWESTERN UNIVERSITY**

#### **Kellogg Graduate School of Management**

- Business Marketing – A graduate level course focusing on industrial and business-to-business marketing principles and cases.

#### **School of Continuing Studies**

- Principles of Marketing – An introductory survey course that covers basic principles including market research.
- Strategic Marketing: Cases in Decision-Making – A more advanced, case-method course.
- Business-to-Business Marketing – A course that explores the differences between consumer marketing and business marketing.
- Introduction to Public Relations – An introductory course that focuses on the various facets of public relations and publicity.
- Integrated Marketing Communications – A course that I created that focuses on the synergies of coordinating all the promotional blend elements.

### **ROOSEVELT UNIVERSITY**

#### **Walter E. Heller College of Business Administration**

Nominated for ADJUNCT FACULTY PERSON OF THE YEAR AWARD in 2005/06.

- Marketing in Theory and Practice – A graduate level course that covers basic principles of marketing and market research.
- Selling and Sales Management – An undergraduate course focusing on consultative selling and the management of the sale force.
- Consumer Behavior – An undergraduate course that explored the how's and why's of consumer purchasing.
- Introduction to Advertising – An undergraduate course focusing on advertising, sales promotion and integrated marketing communications.
- International Marketing Analysis – A graduate level course that probes how foreign companies market in the United States and how domestic companies market abroad.

### **UNIVERSITY OF ILLINOIS AT CHICAGO**

- Advertising and Sales Promotion – An undergraduate course that introduces students to the basic principles of advertising.
- New Product Management – An undergraduate course focusing on the new product development and marketing process.

### **DE PAUL UNIVERSITY**

#### **College of Commerce – Graduate Level**

- Marketing Strategy – A case-oriented course focusing on decision-making.
- Industrial Marketing – A course utilizing cases and text that concentrates on industrial and business-to-business marketing.

#### **College of Commerce – Undergraduate Level**

- Principles of Marketing – A basic, survey course that introduces all the College of Commerce students to marketing.
- Marketing Management – A second-tier course that uses cases to illustrate basic marketing principles.
- Introduction to Advertising – A course for marketing majors that introduces students to basic advertising.



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- Industrial Marketing – A course for marketing majors focusing on industrial and business-to-business marketing.
- Personal Selling – A course for marketing majors that concentrates on consultative selling.

**LAKE FOREST GRADUATE SCHOOL OF MANAGEMENT**

- Marketing Management – An executive graduate-level course that uses cases and a major team project to introduce students to the principles of marketing and marketing management.

**MINNESOTA STATE BAR ASSOCIATION**

Continuing Legal Education

- Faculty member for "The Effective Use of Survey Experts and Evidence in Trademark Cases." Minneapolis State Bar Association, Minneapolis, MN, March 7, 2002.

**MEMBER – INTERNATIONAL TRADEMARK ASSOCIATION**

**LITIGATION EXPERIENCE**

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I have testified in court in the following cases: (side who retained me in **BOLD**)

**Euromarket Designs, Inc., dba Crate & Barrel Limited v. Miriam Peters and Point Blank Multimedia**, testified in U.S. District Court, Chicago, August 3, 2000.

**Heartland Corporation v. Don Siphers et al.**, testified at U.S. District Court, Topeka, KS, on June 25, 2002.

**St. Luke's Eye Center v. James Sanderson et al**, testified at trial at U.S. District Court in Tampa, FL, on June 7, 2007

I have been deposed in the following cases: (side who retained me in **BOLD**)

**Allan J. DeMars, as Trustee for Weisser Eyecare, Inc., v. NBD Highland Park**, October 12, 1996.

**Black & Decker (U.S.) Inc., Black & Decker Inc., and The Black & Decker Corporation v. Pro-Tech Power Inc., P&F Brother Industrial Corporation and Nu-Way Machinery Corporation**, February 5, 1998 And March 5, 1998.

**Atlas Electric Devices Co. v. Q-Panel Lab Products Corporation**, April 26, 2001.

**Motor Werks Partners, L.P. v. BMW of North America**, June 11, 2001.

**Sparks & Crain v. AT&T and Lucent Technologies**, February 18, 2002.

**Native American Arts v. Earth Dweller, Ltd., and The Waldron Corporation**, April 5, 2002.

**Master Tech Products, Inc., v. Prism Enterprises, Inc.**, September 11, 2002.

**Mansfield Plumbing Products L.L.C. v. Mariner Partners, Inc., et al.**, March 4, 2003.

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Horizon Health Services, Inc. v. Allied National, Inc. et al, October 25, 2004.

S&M Nutec, L.L.C. v. T.F.H. Publications, Inc., January 16, 2005.

Century 21 Real Estate v. Century Surety Co., March 1, 2005.

Midwest Canvas Corp. v. Nationwide Tarps, Inc., March 17, 2005.

Seed Lighting Design Co. LTD v. Home Depot, Trend Lighting, Corp and Hampton Bay Fan & Lighting Company, July 14, 2005.

Dioptics Medical Products, Inc. v. PR Trading Company D/B/A/ Polar Ray Sunglasses Corporation, August 13, 2005.

True & Dorin Medical Group v. Leavitt Medical Associates, et al, September 10, 2005

Edina Realty v. TheMLSonline.com, Inc., Oct. 7, 2005.

Kevin Trudeau et al v. George Lanoue et al, November 21, 2005

Dioptics v. PR Trading Company, Feb. 17, 2006.

Wenger Corporation v. The Stadium Chair Company, LLC, June 22, 2006

Cobra Capital v. LaSalle Bank Corporation et al, July 26, 2006

Illinois Tool Works v. Chester Brothers Machined Products, Inc. d/b/a Pneu-Fast, Aug. 15, 2006

Note Family, Inc. v. Vivendi Universal Games, Inc., October 4, 2006

St. Luke's Eye Center v. James Sanderson et al, March 15, 2007

University of Kansas et al v. Larry Sinks et al, May 29, 2007.

St. Luke's Eye Center v. James Sanderson et al, testified at trial at U.S. District Court in Tampa, FL, on June 7, 2007

Just Enterprises, Inc. v. (888) Justice, Inc. on January 11, 2008.

Schneider Saddlery Co., Inc. v. Best Shot Products International LLC on February 6, 2008.

Scaffiddi Motors v. General Motors Corporation on March 3, 2008.

Mini Melts, Inc. v. Adams Respiratory Operations, Inc. d/b/a Adams Respiratory Therapeutics on March 13, 2008.

**BILLING RATE (FOR EXPERT WITNESS SERVICES)**

\$400 per hour (\$450 for time spent preparing for and participating in testimony)

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**SUPPLEMENT A***A Compilation of Published Articles  
Written by James T. Berger*

1998		
Fall	Active Times	Wanted: Mature Workers Who Need Minimal Training, Many Positions Available
Sept-Oct	National Bus Employment Weekly	What's an M.B.A. worth?
Sept-Oct	National Bus Employment Weekly	The Degree Dilemma
November	Chgo Sun Times Business Life	Buying Into Barter
December	Crain's Chicago Business	A Crucial Goal: Increasing Schools' Visibility
Jan-Dec	Writer's Digest	
1999		
January	Business Life	Business is Booming in Executive Temp Industry Gary Canepa / Patty Ancona / Patraick Fortin / Richard Blevins / Nancy Mroz
38744	Real Estate Profiles	Medical Industry Goes Under the Knife
April	Business Life	Will Earning An MBA Pay off Later in Life?
38823	Wall Street Journal	Networking 101
Spring	Business Sense	Building Solid Financial Foundations
June	Business Life	Blueprint for Success
June	Your Business	Building Earnings by Barbara B. Buchholz
June	Small Business Adviser	Tips Could Help You Sell Your Home by Yourself
June	Chgo Sun Times Business Life	X-Termination
July - Aug	American Fitness	Building Solid Foundations
July	Business Life	Expanding Your Horizons
Summer	Your Business	Factoring Takes New Meaning in Today's Global Economy
August	Business Life	Push to Revive Reverse Mortgage
September	Chgo Sun Times Business Life	Opportunities Abound for Older Workers
September	Business Life	Working Into Retirement
September	Kiwanis	10 Easy Ways to Lose a Client
September	Independent Business	Wet and Wild on the West Coast by J. Fisher Park & J. Morgan Park
Fall	Recreation Management	Reversal of Fortune for Reverse Mortgages
September	Active Times	Mortgage Plan Helps Buyers with Bad Credit
September	Chgo Sun Times Homelife	Mortgage Lenders Won't Suffer Despite Market Changes
September	Chgo Sun Times Homelife	Are Stockbrokers and Endangered Species?
November	Business Life	Turning Hobbies Into Profitable Home-Based Businesses
November	Home Business	Prepayment Penalty Offers a Trade-Off for Homeowners
November	Chgo Sun Times Homelife	No Doc Loans Help Self-Employed
November	Chgo Sun Times Homelife	Entire Year
17-Dec	Chgo Sun Times Homelife	
1999	Commercial Lending Report	
2000		
7-Jan	Chgo Sun Times Homelife	Blacks Still Face 'Predatory Lending' Schemes: study
12-Jan	Chgo Sun Times Homelife	Home Ownership Rising in Nation, While Equity is Falling
14-Jan	Chgo Sun Times Homelife	New Laws Might Boost Reverse Mortgage's Appeal
16-Jan	Chgo Sun Times Homelife	Banking On Your Home
21-Jan	Chgo Sun Times Homelife	Not All Mortgages Require Buyer to Make a Down Payment
22-Jan	Active Times	Do Banks Protect Your Privacy

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28-Jan	Chgo Sun Times Homelife	Legal Foundation Guards Against Mortgage Scams
January	Business Life	WWII Fighting For Bandwidth
January	Recreation Management	Welcome To The Great Outdoors
January	Commercial Lending Report	All Loans Are "Good" When You Make Them
Winter	Business Sense	Grievance Alert
11-Feb	Chgo Sun Times Homelife	Your Portfolio Can Provide Mortgage Down Payment
18-Feb	Chgo Sun Times Homelife	Worried Buyer Can Try An Interest-Rate Option
25-Feb	Chgo Sun Times Homelife	Go For Brokers
Feb-29	Chgo Sun Times Business	Leap Day has It's Benefits
February	Business Life	WWII Fighting For Bandwidth
3-Mar	Chgo Sun Times Homelife	Rising Interest Rates Take Toll on Buyers Mortgages
17-Mar	Chgo Sun Times Homelife	Home Saver Helps Avert Foreclosure
24-Mar	Chgo Sun Times Homelife	Closing On A Home Often Troublesome
31-Mar	Chgo Sun Times Homelife	Web Portal Can Speed Loan Process
March	Recreation Management	If You Build It, They Will Swim
March	Business Life	Consumers Not Ready to Leave Mall Behind
May	Texas Realtor	What's Up With Mortgages?
10 - Oct	Chgo Sun Times Homelife	Fed holds key to stable mortgage rates: experts
29 - Oct	Chgo Sun Times Homelife	Landscaping is a cheap and easy fix
29 - Oct	Chgo Sun Times Homelife	Home offices, pools not worth it
3 - Nov	Chgo Sun Times Homelife	As closing nears, lender wants money for a "hold back"
17 - Nov	Chgo Sun Times Homelife	Fannie Mae helps lending victims
24 - Nov	Chgo Sun Times Homelife	'Tis the season to be wary when seeking a mortgage
1 - Dec	Chgo Sun Times Homelife	Chicago mortgage bank reaches out to immigrants, minorities
3 - Dec	Chgo Sun Times Homelife	Land contract may fail without canceled checks
<b>2001</b>		
January 12	Chgo Sun Times Homelife	Showcase of Homes Offers Vision of Future
19-Jan	Chgo Sun Times Homelife	Failure To Compute
January	Multifamily Executive	Generation Y Hits the Market
January	Multifamily Executive	Peace of Mind - Renter's Insurance Can Protect Property
16-Feb	Chgo Sun Times Homelife	Tailor Made - New Type of Mortgage is Uniquely Designed for Individual Borrowers
February	Bizlife	Grass America Inc: What the Well-Dressed Kitchen is Wearing
March	Real Estate Chicago	Kenosha Casino Nixed
March	Utah Business	Whittling Down the Tax Man
6-Apr	Chgo Sun Times Homelife	Homeowner insurance not enough to cover a home office or business; Protecting the Boss
Spring	Bizhealth	Family Service of the Piedmont
April	Rotarian	Boot Up Soldier!
May	Real Estate Chicago	A Soft Office Market
June	Real Estate Chicago	Lake County Land Squeeze
September	Area Development	Industrial Market
October	Real Estate Chicago	Update at the Glen
Nov-Dec	Commercial Real Estate	Virtual Money
Nov-Dec	Real Estate Chicago	Abbott Leases Big
<b>2002</b>		
February	Area Development	Property Protection Comes of Age
March	Texas Realtor	On Loan
March	Area Development Magazine	On the Fast Track to Freer Trade?
March	Real Estate Chicago	City Park in Home Stretch

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April	Real Estate Chicago	Recovery Ahead?
April	Crain's Chicago Business	Trusts a Must for the Moneyed;
May	Real Estate Chicago	Variety of Plans Offer Tax Beaks, Other Incentives
June	Area Development	The Mallinckrodt Property
July	Area Development	Welcoming Recovery
July	PS&P	Assessing the Post-War Economy
July-Aug	Journal of Property Management	Site Selection Shake Up
September	PS&P	Flower Power (Interior Landscape)
October	Bizlife	Avoiding Economic Espionage
		The Man Behind the High Point Transportation
<b>2003</b>		
2003/2004	PS&P	
August	Wiglaf Journal	Getting Lost on the World Wide Web
		10 Frequently Asked Questions about Intellectual Property
August	Intellectual Property Today	Litigation Surveys
<b>2004</b>		
May	Plants Sites & Parks	Milwaukee on the Grow
June	Intellectual Property Today	Swimming In Shark-Infested Waters
July	Plants Sites & Parks	Electronics Industry on the Fast Track
September	Wiring Harness News	Using Customer Service as a Competitive Edge
		U.S. Economic Recovery Spurs Industrial Park Growth in Mexico
November	Plants Sites & Parks	Getting the Most Value Out of Your Survey Expert
November	Intellectual Property Today	
<b>2005</b>		
January/February	Executive Decision	On The Job with "The Apprentice"
		Why Chicago Is Bill Rancic's Kind of Town
March	The Wiglaf Journal	The Decline and Fall of the AT&T empire — Marketing Myopia
April	The Wiglaf Journal	Revisited
May	Executive Decision	10 Easy Ways to Lose a Customer
June	The Wiglaf Journal	Secrets of the Best Rainmakers
July	Intellectual Property Today	Converting Productivity to Profitability
August	The Wiglaf Journal	Creativity Key to Executing Toughest IP Survey Projects
		What's In a Name?
<b>2006</b>		
January	The Wiglaf Journal	Thoughts on Relationship Marketing
		A Matter of Survival:
January/February	Executive Decision	CEOs need to commit to Lifelong Learning
February	The Wiglaf Journal	Peeling the Customer Loyalty Onion
March	The Wiglaf Journal	Creating "Monopolies" from Customer Value Propositions
March/April	Executive Decision	The Rich Get Richer
		What IP Attorneys Should Know Expect & Costs for Survey Research
April	Intellectual Property Today	All The Right Moves
		Strategies and Tactics for Corporate Relocations
May/June	Executive Decision	A New Life for ABLs, Strong Economy and Lots of Available Cash Fuel Asset-Based Lending Boom
July/ August	Executive Decision	Integrated Marketing Environment Putting New Pressure on Sales Management
September	The Wiglaf Journal	All Banks are not created Equal
September/October	Executive Decision	Sponsors "Brand" Housing Credit Properties
December	Tax Credit Advisor	
<b>2007</b>		

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January	Intellectual Property Today WebsiteRevamp.org	10 Easy Ways to Blow Away A Survey Lost on The Web Multifamily Realtors See Benefits of Branding in Driving Internet Sales Bridgeport Historic Rehabilitation Project Helping to Transform Downtown Cover Story: AML's Secret Formula – All the Ingredients for Sophistication Spotlights: Executive – No. 1 Cheerleader – Mutz Has Spirit and Vision Management – Taking Full Advantage – Technology Provides a Competitive Edge Marketing – Brand Loyalty – AML Markets Through its Brand Training – Pursuit of Excellence – Training Helps AML Reach Goals On Site – Know the Facts – AML Serves through Information
January	WebsiteRevamp.org	
January	Tax Credit Advisor	
January/February	MultiFamily Pro	
	MultiFamily Pro	
	MultiFamily Pro	
	MultiFamily Pro	
	MultiFamily Pro	
	MultiFamily Pro	
February	The Wiglaf Journal	The "iPhone" Brouhaha Different Actions, Tactics can Foster Quicker, Effective Lease- Up of New Tax-Credit Properties
March	Tax Credit Advisor	Don't Segment Markets — "Hire" the Product
March	The Wiglaf Journal	The Challenge Of Building A Global Workplace Community Cover Story: Place Properties Is The Place – Welcome to the World of Student-Friendly College Housing Spotlights: Executive – Nightmare Interupus – Phillips Filled a Student Housing Need Management – An Engaged Audience – Ratchford Attracts Generation Y with Technology Marketing – Hitting the Target – Nix and Dunton Market to Distinct Groups Training – Gaining an Edge – Wolff Directs the Management Team On-Site – Two-Sided Approach – Place Focuses Both On and Off Campus Reducing Tenant "Churn" Essential for Successful Tax Credit Properties Industry Participants Suggest Ways to Trim Construction Operating Costs A New Way to Segment B-T-B Markets — Put Your Product to Work Adding Green To The Bottom Line The Difficulty of Developing Profitable and Unique Sales Promotions Market Studies Remain Key for Determining Feasibility of Proposed LIHTC Projects The Perils of Using the Internet for Surveys Is the Private Life for You? More Private Companies Are Opting To Go Private How to Make Your E-Mail Marketing More Effective Affordable Rental Housing Development Is Becoming Increasingly "Green"
March/April	Executive Decision	
March/April	MultiFamily Pro	
	MultiFamily Pro	
	MultiFamily Pro	
	MultiFamily Pro	
	MultiFamily Pro	
	MultiFamily Pro	
April	Tax Credit Advisor	
May	Tax Credit Advisor	
May	The Wiglaf Journal	
May/June	Executive Decision	
June	The Wiglaf Journal	
June	Tax Credit Advisor	
July	The Wiglaf Journal	
July/August	Executive Decision	
August	The Wiglaf Journal	
August	Tax Credit Advisor	
August	Intellectual Property Today	
August	Tax Credit Advisor	
October	Tax Credit Advisor	
November	Tax Credit Advisor	
		Baltimore Area Marked By High Demand for Additional